

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NICHOLAS BLUE,

Plaintiff,

V.

CAROLYN W. COLVIN,
Acting Commissioner of Social Security,

Defendant.

Case No. C14-5962-MJP-BAT

REPORT AND RECOMMENDATION

Nicholas Blue appeals the ALJ's written decision finding him not disabled. He contends
ALJ misevaluated the lay testimony, school records, receipt of a state funded caregiver, and
opinions of the state agency medical consultants, and that the Court should therefore reverse
commissioner's final decision and remand the case for an award of benefits. Dkt. 12 at 1-2.
cussed below, the ALJ did not commit reversible error in evaluating the lay testimony, and
t of caregiver services. However, the ALJ harmfully erred in determining Mr. Blue's
ual Functional Capacity ("RFC") by failing to account for all of the limitations contained in
chool records and assessed by the agency medical consultants. Because the record does not
ish a clear entitlement to benefits, the ALJ's errors do not compel an award of benefits.
Court accordingly recommends **REVERSING** the Commissioner's final decision and

1 **REMANDING** the case for further administrative proceedings under sentence four of 42 U.S.C.

2 § 405(g).

3 **BACKGROUND**

4 Mr. Blue is currently 21 years old, has no work experience and as of May 2013, was
 5 working on completing high school. Tr. 24, 44, 264. In December 2011, he applied for benefits,
 6 alleging disability since January 1998 (age three). Tr. 75. His applications were denied initially
 7 and on reconsideration. Tr. 80, 89. At the April 22, 2013, hearing before the ALJ, Mr. Blue
 8 amended his alleged onset date to his eighteenth birthday, January 17, 2012. Tr. 17. The ALJ
 9 found Mr. Blue not disabled, and as the Appeals Council denied review, the ALJ's decision is
 10 the Commissioner's final decision. Tr. 1-7.

11 **THE ALJ'S DECISION**

12 Utilizing the five-step disability evaluation process,¹ the ALJ found at steps one through
 13 three that Mr. Blue last worked in December 2011; that attention deficit hyperactivity disorder,
 14 bipolar disorder II, generalized anxiety disorder, Asperger's syndrome, and cannabis abuse were
 15 severe impairments; and that none of these impairments met the Listings.² Tr. 19-21. With
 16 these impairments, the ALJ found Mr. Blue had the RFC to perform work at all exertional levels
 17 with the following mental functional limitations: He could understand, remember, and carry out
 18 simple and detailed repetitive tasks and work in a stable, predictable workplace setting where
 19 contact with the general public was not an essential element but incidental contact was not
 20 precluded; and he should not perform work with tandem tasks or tasks requiring cooperative
 21 team effort. Tr. 21. At step four, the ALJ found Mr. Blue had no past relevant work. However,
 22 at step five, the ALJ found Mr. Blue not disabled based on a Vocational Expert's (VE) testimony

23 ¹ 20 C.F.R. §§ 404.1520, 416.920.

² 20 C.F.R. Part 404, Subpart P. Appendix 1.

1 that there were jobs in the national economy that he could perform. Tr. 25.

2 **DISCUSSION**

3 **A. Lay Witness Evidence**

4 Mr. Blue's mother, Dawn McClintock, and grandfather, Donald McClintock, provided
5 lay witness testimony. An ALJ must consider lay witness testimony concerning a claimant's
6 ability to work. *Stout v. Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1053 (9th Cir. 2006). Lay
7 witness testimony includes evidence of the claimant's symptoms or the impact of impairment on
8 claimant's ability to work. *Id.* The ALJ must provide a germane reason to disregard a lay
9 witnesses testimony. *Turner v. Comm'r of Soc.Sec. Admin.*, 613 F. 3d 1217, 1224 (9th Cir.
10 2010).

11 Ms. McClintock completed a written questionnaire in October 2012 and testified at the
12 hearing before the ALJ. Tr. 267-72, 61-68. In the 2012 questionnaire, she stated Mr. Blue
13 isolated himself and spent much of his time alone, that he could not remember simple tasks, had
14 difficulty sitting still, and could be anxious, violent, upset, and depressed. Tr. 267-9. She also
15 noted he received assistance with shopping, cleaning, cooking, medical appointments, and
16 reminders for personal care, and had trouble staying on task to completion. Tr. 270-1. At the
17 hearing, she testified Mr. Blue had poor social skills, rocked to calm himself, could not manage
18 money, pay bills, make good food choices, do laundry, or practice good hygiene. Tr. 63-4. She
19 described Mr. Blue's anger and frustration over the constant reminders he needed to perform
20 daily functions, such as teeth brushing. Tr. 65. She also acknowledged his marijuana use and
21 attempts to remain clean. Tr. 65-67. Ms. McClintock believed her son could not live
22 independently. Tr. 64.

23 Mr. Blue's grandfather provided similar testimony in an October 2012 questionnaire. Tr.

1 273-8. He stated Mr. Blue was very distressed and depressed, rocked constantly and could be
2 very combative; that he was withdrawn, isolated, and paranoid that people were staring or talking
3 about him; and that he had difficulties with memory, focus, and responding to change. Tr. 273-
4 7. Mr. McClintock also believed that Mr. Blue's mental health issues had worsened over the
5 years. Tr. 278.

6 The ALJ stated "I accord some weight to [these] lay statements in finding some degree of
7 cognitive and social limits. However as neither lay report accounts for the claimant's marijuana
8 abuse, greater weight is not given." Tr. 24. A lay witness's failure to acknowledge known
9 substance abuse creates doubt about the reliability of the statement. *See Gray v. Comm'r of Soc.
10 Sec. Admin*, 365 F. App'x 60, 62 (9th Cir. 2010). Mr. McClintock's statement contains no
11 indication that he was aware of Mr. Blue's marijuana use. Tr. 273-8. The record thus supports
12 the ALJ's finding that Mr. McClintock's testimony about Mr. Blue's limitations does not
13 account for Mr. Blue's drug use. As such, the ALJ provided a germane reason, supported by
14 substantial evidence, to discount Mr. McClintock's lay witness statement.

15 However, the same cannot be said about the ALJ's treatment of Ms. McClintock's
16 testimony. It is true Ms. McClintock did not mention marijuana use in her written statements.
17 But, at the hearing before the ALJ, she testified at some length about Mr. Blue's marijuana use,
18 how it was an "ongoing problem," and how she did not notice behavioral changes in Mr. Blue
19 when he was using marijuana. Tr. 65-8. The ALJ made no mention about Ms. McClintock's
20 hearing testimony, and gave no reason to discount it. As Ms. McClintock's hearing testimony
21 showed she knew about her son's marijuana use and its impact on his behavior, the ALJ's
22 determination that Ms. McClintock's lay evidence should be discounted for failure to account for
23 Mr. Blue's drug use is not supported by substantial evidence.

1 Although the ALJ erred, the error is nonetheless harmless. The lay witnesses in this case
2 described the same limitations that Mr. Blue described in his own testimony. The ALJ
3 discounted Mr. Blue's testimony on the grounds that it was inconsistent with his treatment
4 records which showed symptom improvement, daily activities, mental status examinations
5 including a full scale IQ of 107, and his presentation during a 2012 mental evaluation. Tr. 22-3.
6 Mr. Blue did not appeal or challenge the ALJ's determination that his testimony was not fully
7 credible. Because the reasons the ALJ gave to reject Mr. Blue's testimony apply with equal
8 force to the lay testimony, any other error the ALJ may have committed in discounting the
9 McClintocks' testimony was harmless. *See, Valentine v. Comm'r of Soc. Sec. Admin,* 574 F.3d
10 685, 693 (9th Cir. 2009); *Molina v. Astrue*, 674 F.3d 1104, 1114 (9th Cir. 2012) (When an ALJ
11 properly rejects the claimant's subjective complaints, the reasoning also applies to lay witness
12 statements of a similar nature).

13 **B. School Records**

14 School records are relevant in evaluating the severity of a young adult's impairment.
15 SSR 11-2p. This includes the Individualized Education Program (IEP) transition plan that,
16 "describes a student's levels of functioning based on reasonable estimates by both the student
17 and the special education team. It also identifies the kinds of vocational and living skills the
18 young adult needs to develop in order to function independently as an adult." *Id.* The record
19 contains records from Mr. Blue's high school, including a February 2013 re-assessment of his
20 IEP and a January 2013 psycho-educational report. Tr. 304-13, 530-7. The ALJ addressed the
21 psycho-educational report but did not specifically discuss the IEP. Tr. 22.

22 Mr. Blue contends the ALJ erred in two ways. He argues the ALJ was required to
23 consider the IEP, failed to "acknowledge" the limitations described in the IEP, and thus

1 committed reversible error. Dkt. 12 at 8-10. He also argues that the ALJ harmfully erred by
2 failing to include all of the limitations contained in both school reports. *Id.* In specific, he
3 argues that the “educational reports” do not show Mr. Blue would be successful in the work
4 setting described by the ALJ. Dkt. 16 at 5. Mr. Blue argues that the reports instead show he can
5 focus in a quiet room on a good day, requires one-on-one instruction to focus on tasks, cannot
6 work independently “if there is other activity,” and has difficulty organizing, being on time, and
7 maintaining attendance. Mr. Blue argues the ALJ failed to account for these limitations in
8 determining his RFC and thus committed reversible error. *Id at 5-6.*

9 The Commissioner disagrees. The Commissioner argues there is “no significant
10 difference” between the limitations contained in the IEP and the psycho-educational report. As
11 such, the Commissioner contends the ALJ’s failure to directly address the IEP was harmless.
12 Dkt. 15 at 7. The Commissioner further argues the ALJ reasonably assessed all of the limitations
13 set forth in the psycho-educational report and IEP, and that the ALJ’s RFC determination thus
14 properly accounted for all limitations contained in the school records. Dkt. 15 at 7-8.

15 Turning to Mr. Blue’s first argument, the record shows that the psycho-educational report
16 contains far more detailed information about Mr. Blue’s limitations than the IEP. Mr. Blue has
17 not pointed out any specific limitation contained in the IEP that was not contained in the psycho-
18 educational report. Consequently, he has failed to meet his burden to show the ALJ committed
19 harmful error. *See Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (“[T]he burden of showing that
20 an error is harmful normally falls upon the party attacking the agency’s determination.”). In any
21 event, the IEP contained essentially the same information contained in the psycho-educational
22 report, discussed below. The IEP primarily assessed areas of needed improvement, noting Mr.
23 Blue needed more time to complete school work, Tr. 305; needed help with planning, completing

1 job applications, and organizing his work Tr. 306-7; preferred hands-on learning; and had limited
2 math solving skills. Tr. 308. The IEP also detailed improvements in Mr. Blue's behavior,
3 including a decrease in the frequency of behavioral problem, improvement in complying with
4 requests, and completing and turning in assignments. Tr. 309. Given the overlap of information
5 between the IEP and the psycho-educational report, the ALJ's failure to specifically comment on
6 the IEP was harmless error.

7 Turning to Mr. Blue's second argument, the record shows the ALJ failed to discuss all of
8 the limitations set forth in the psycho-educational report. The ALJ found Mr. Blue's school
9 records showed his symptoms "have waned"; that Mr. Blue was described as intelligent,
10 personable and generally polite; that he had good insight in what he read and could formulate
11 complex responses when motivated; that he had difficulty with math concepts and did best
12 working one on one on math problems; that he had difficulty with staying on task in large
13 classrooms but was able to focus in smaller classroom settings; and that Mr. Blue had difficulty
14 completing assignments. Tr. 22.

15 The Commissioner argues that these findings are a reasonable interpretation of all of the
16 limitations set forth in Mr. Blue's school records. The record does not support this argument
17 because the school records contained other limitations that the ALJ failed to discuss. Hence
18 there is nothing to show that the ALJ considered all of the limitations contained in the school
19 records, or reasonably construed all of the limitations. Limitations contained in the psycho-
20 educational report that the ALJ failed to mention include the following: "Nick has struggled
21 with attendance," "it is very difficult to get him to work and not draw others off task": "In the
22 resource room, Nick is able to focus when working one on one with the teacher": "if he is in a
23 good space, he can work independently struggles to stay on task if there is other activity going on

1 the room”; Tr. 532, “he can be disruptive due to talkativeness and he does not work well
 2 independently”; “He seldom completes assignments and needs assistance to both initiate and
 3 complete assignments”; He fails to complete work to the “point where verbal prompts are
 4 ignored.” Tr. 533.

5 While it is the ALJ’s prerogative to weigh the evidence, *Andrews v. Shalala*, 53 F.3d
 6 1035, 1039 (9th Cir. 1995), the ALJ may not disregard relevant evidence without comment. *See*
 7 *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1984) (ALJ must explain why “significant,
 8 probative evidence has been rejected.”). Here, as the ALJ omitted without comment limitations
 9 that were contained in the school records and which were relevant to assessing Mr. Blue’s RFC,
 10 the ALJ harmfully erred. *See* 20 C.F.R. § 416.945(a) (ALJ must assess all relevant evidence to
 11 determine what capacity the claimant has for work in determining a claimant’s RFC).

12 **C. Evidence that Mr. Blue was Provided a State Funded Caregiver**

13 In March 2012, Mr. Blue qualified for 103 hours of State funded care to help with his
 14 daily needs, including assistance with shopping, budgeting, paying bills, housework, and
 15 cooking, as well as reminders to perform basic personal care. Tr. 463-517. Mr. Blue’s mother
 16 requested this assistance because Mr. Blue “just turned 18 and is still attending high school at
 17 least until the end of 2012.” Tr. 482. The ALJ noted but gave little weight to Mr. Blue’s receipt
 18 of these services, “as it is not entirely clear that such services were needed.” Tr. 24. The ALJ
 19 found that “[a]t the time he received the services, the claimant had always lived at home. It
 20 would be reasonable to infer that the claimant’s circumstances, particularly his young age and
 21 being in high school, significantly impacted the perceived need for services.” Tr. 24.

22 Mr. Blue disagrees, arguing that the need for assistance with basic daily activities is a
 23 significant fact that demonstrates his inability to function independently and effectively in a

1 work setting. Dkt. 12 at 11. Mr. Blue's argument fails for several reasons. First, the fact that he
2 received state funded personal care, alone, is not evidence that Mr. Blue cannot perform work
3 activity and is disabled. For instance a person might receive such personal assistance due to
4 mobility problems, but still be capable of performing gainful work activities. Second, the
5 personal assistance records indicate Mr. Blue has some limitations. However the materials do
6 not contain any functional assessments or opinions as to what this means regarding Mr. Blue's
7 ability to perform gainful work. In other words, Mr. Blue has not shown that he was prejudiced
8 by the ALJ's treatment of the personal assistance materials because he has not shown the
9 materials contain limitations that the ALJ failed to discuss elsewhere.

10 And lastly, Mr. Blue and the Commissioner spar over what the state grant of personal
11 care services amounts to. Mr. Blue argues that "the fact an 18 to 19 year needs the state to pay
12 for a caregiver shows that he needs more assistance than would generally be provided to other
13 individuals." Dkt. 16 at 6. The Commissioner argues the ALJ reasonably found the services
14 were related to Mr. Blue's young age and transition from living at home to independence. Tr.
15 24. As both arguments are reasonable, the Court is required to uphold the ALJ's determination.
16 See *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002) ("Where the evidence is susceptible
17 to more than one rational interpretation, one of which supports the ALJ's decision, the ALJ's
18 conclusion must be upheld."). Accordingly, for the foregoing reasons, the Court affirms the
19 ALJ's determination that Mr. Blue's receipt of the state services should be accorded little weight.

20 **C. Agency Medical Consultant Opinions**

21 Agency medical consultant Edward Beatty, Ph.D., evaluated Mr. Blue's medical records
22 and provided a functional capacity assessment. Tr. 400. He opined that Mr. Blue was capable
23 of non-complex, multi-step, repetitive tasks, but "[d]ue to Asperger's social s[ympoms],

1 claimant should have limited contact with the general public. In a small group he is capable of
 2 adequate work-related social interactions with supervisors and coworkers.” Tr. 400. On
 3 reconsideration, a second consultant, Dan Donahue, Ph.D., affirmed Dr. Beaty’s assessment.³
 4 Tr. 458.

5 “State agency medical and psychological consultants and other program physicians,
 6 psychologists, and other medical specialists are highly qualified physicians, psychologist, and
 7 other medical specialists who are also experts in Social Security disability evaluation.” 20
 8 C.F.R. § 416.927(e)(2)(i). Given this expertise, an ALJ must not ignore these opinions. SSR 96-
 9 6p. The ALJ must weigh the limitations and accept or provide reasons for rejection. “If the RFC
 10 assessment conflicts with an opinion from a medical source, the adjudicator must explain why
 11 the opinion was not adopted.” SSR 96-8p.

12 Here, the ALJ purported to give great weight to the consultants’ opinions, “as they are
 13 consistent with the claimant’s reports of doing well in school with good or passing grades, as
 14 well as, at home . . . Their medical opinions also adequately account for the claimant’s history of
 15 distractibility while working around others.” Tr. 23. In determining Mr. Blue’s RFC, the ALJ
 16 incorporated the task and public interaction limitations set forth in Dr. Beaty’s functional
 17 capacity assessment. Tr. 21. But, rather than include a restriction to work environments with
 18 small groups, the ALJ found that “[t]he claimant can perform work without tandem tasks or tasks
 19 requiring a cooperative team effort.” Tr. 21. Mr. Blue argues the ALJ’s RFC determination
 20 does not adequately account for Dr. Beaty’s small group limitation. Dkt 12 at 12-13. The
 21 Commissioner contends that the restriction on tandem and teamwork tasks is a reasonable

22
 23 ³ Dr. Donahue affirmed Dr. Beaty’s assessment as written and provided no additional information. Tr. 458. For ease of reading, the remainder of the discussion will attribute the assessment to Dr. Beaty, although the analysis applies equally to Dr. Donahue.

1 interpretation of the small group limitation assessed by Dr. Beaty. Dkt. 15 at 2.

2 The record does not support the Commissioner's argument. The record shows that the
3 ALJ specifically approved of Dr. Beaty's opinion as "adequately account[ing] for the claimant's
4 history of distractibility while working around others." Tr. 23. However, there is nothing in the
5 record showing that the ALJ rejected the doctor's opinion that Mr. Blue needed to work in a
6 "small group." The ALJ further provided no explanation or indication that tandem or
7 cooperative tasks accounted for the small group limit. Tr. 23. In fact, in other portions of the
8 written decision, the ALJ referenced a school report that "noted difficulties staying on task in
9 larger classroom setting, but indicated that he was able to focus in a smaller room setting," Tr.
10 22, and noted that Mr. Blue had moderate difficulties in social functioning as demonstrated by
11 his distractible and disruptive behavior around others in school, but "the claimant has been able
12 to work in a smaller classroom setting." Tr. 20. The ALJ's decision thus makes clear that the
13 ALJ was clearly aware that Mr. Blue had success in smaller settings and significant difficulties
14 working in a larger environment.

15 Despite Dr. Beaty's opinion and other evidence of record, the RFC, as set forth in the
16 ALJ's written decision, plainly limits Mr. Blue only from performing tasks in tandem or
17 cooperative group team effort, but makes no mention of a small group limitation. Tr. 21. The
18 RFC as written thus allows Mr. Blue to work in any workplace environment—including a large,
19 busy setting—as long as he did not perform tasks in concert with others. Such a workplace is
20 inconsistent with the small group limitation assessed by the agency consultants. As such, the
21 ALJ's RFC determination fails to account for the consultants' functional capacity assessments,
22 despite the great weight given to their opinions by the ALJ.

23 In sum, the ALJ, erred by failing to incorporate, without comment, Dr. Beaty's small

1 group limitation, a limitation that was consistent with other portions of the record. This error
2 was harmful because the ALJ failed to account for the small group limitation in determining Mr.
3 Blue's RFC. *Mayes v. Massanari*, 276 F.3d 453, 460 (9th Cir. 2001). This failure further
4 undermines the ALJ's step five finding that Mr. Blue can perform gainful work. The
5 Commissioner bears the burden at step five to show Mr. Blue can perform gainful work. *Tackett*
6 *v. Apfel*, 180 F.3d 1094, 1100 (9th Cir. 1999). To meet this burden, the ALJ solicited testimony
7 from a vocational expert through hypothetical questions. *Id.* at 1100-1101, Tr. 70-71.
8 "Hypothetical questions posed to the vocational expert must set out *all* the limitations and
9 restrictions of the particular claimant." *Embrey v. Bowen*, 849 F.2d 418, 422-3 (9th Cir. 1988).
10 When the hypothetical is not supported by the record and does not include all the limitations, the
11 testimony of the vocational expert has no evidentiary value. *Id.*

12 In this case, the vocational expert was posed a hypothetical question that failed to include
13 the "small group" limitations. Because the VE identified jobs based on an incomplete RFC, the
14 VE's testimony has no evidentiary value and the case must be reversed for further proceedings.

15 **E. Scope of Remand**

16 Mr. Blue contends that the Court should remand this matter for an award of benefits. The
17 Court may remand for an award of benefits where the record is fully developed and additional
18 proceedings would serve no useful purpose; the ALJ failed to provide legally sufficient reasons
19 for rejecting evidence, and if the improperly discredited evidence were credited as true, the
20 claimant would be disabled. *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir. 2014). The Court
21 abuses its discretion by remanding for further proceedings where the record establishes no basis
22 for serious doubt that the claimant is not in fact disabled. *Id.* at 1023.

23 Only in rare circumstances should a Court remand a case for an award of benefits, and

1 this is not such as case. *Treichler v. Comm'r of Soc. Sec.*, 775 F3d 1090, 1099 (9th Cir. 2014).
2 Here the ALJ failed to assess certain limitations contained in Mr. Blue's school records and Dr.
3 Beaty's "small group" limitation. Based on the record, the Court cannot say that there is no
4 serious doubt that Mr. Blue is disabled as a matter of law. The Court should thus decline to
5 decide in the first instance exactly what Mr. Blue's limitations amount to, and what testimony a
6 VE might give following a weighing of the evidence. Further proceedings would thus not only
7 be useful but are necessary to address and determine the true extent of Mr. Blue's limitations and
8 whether he can or cannot perform gainful work activity.

9 CONCLUSION

10 For the foregoing reasons, the Court recommends that the Commissioner's final decision
11 be **REVERSED** and the case be **REMANDED** for further administrative proceedings under
12 sentence four of 42 U.S.C. § 405(g). On remand, the ALJ shall reevaluate Mr. Blue's school
13 records, and Dr. Beaty's opinion that Mr. Blue is limited to work involving small groups;
14 develop the record as necessary; reassess Mr. Blues' residual functional capacity as needed and
15 proceed to step five with testimony from a vocational expert testimony as appropriate.

16 A proposed order accompanies this Report and Recommendation. Any objection to this
17 Report and Recommendation must be filed and served no later than **May 18, 2015**. If no
18 objections are filed, the Clerk shall note the matter for May 22, 2015as ready for the Court's
19 consideration. If objections are filed, any response is due within 14 days after being served with
20 the objections. A party filing an objection must note the matter for the Court's consideration 14
21 days from the date the objection is filed and served.

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23

Objections and responses shall not exceed eight pages. The failure to timely object may affect the right to appeal.

DATED this 4th day of May, 2015.


BRIAN A. TSUCHIDA
United States Magistrate Judge